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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CELANESE CORPORATION,
Petitioners,

v.

MARTIN K. EBY CONSTR. CO., INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a party that causes a disposal of hazardous substances, and has an affirmative obligation to investigate and control that disposal but fails to do so, is liable as an arranger under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)?

II. Whether an unsuccessful effort to prove more than the law requires results in a waiver of the right to argue that the facts found by the District Court establish liability as a matter of law?

CORPORATE DISCLOSURE STATEMENT

Celanese Corporation is a public traded corporation. FMR LLC, f/k/a/ FMR Corp., owns 16.1% of Celanese stock; Adage Capital Partners LP owns 10.2% of its stock.

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CELANESE CORPORATION,
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OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 620 F.3d 529 (5th Cir. 2010), and is reprinted at App. 1a. The principal opinion of the District Court is not reported but is available on line at 2009 WL 981717 (S.D. Tex. 2009), and is reprinted at App. 10a. The opinion of the District Court denying Celanese's Rule 59(e) motion is not available online, but is reprinted at App. 23a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), in that Celanese seeks review of a judgment rendered by a United States Court of Appeals. The

Fifth Circuit issued its opinion on September 20, 2010. App. 1a. Celanese filed a timely petition for rehearing en banc on October 4, 2010, which the Fifth Circuit denied on October 26, 2010. App. 26a. This petition is timely in that it is filed within 90 days of the latter date.

STATUTES INVOLVED

Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9607(a), provides in pertinent part:

> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances
>
> . . .
>
> shall be liable for–
>
> > (A) all costs of removal or remedial action incurred by the United States Government or a State or Indian tribe not inconsistent with the national contingency plan;
> >
> > (B) any other necessary costs of disposal incurred by any other person consistent with the national contingency plan;
> >
> > (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 104(i).

INTRODUCTION

This case is about the intent element of arranger liability under CERCLA, an issue on which there is a deep and abiding circuit court split. In the course of building a pipeline, an Eby backhoe hit and damaged a Celanese pipeline. The damaged pipeline ultimately sprang a leak, leading to the release of hundreds of thousands of gallons of methanol, an extremely flammable and hazardous substance.

The District Court found that the sole cause of the leak was the damage done by the Eby backhoe and that, but for that strike, the leak would not have occurred. The District Court exonerated Eby, because – although the operator of the backhoe knew he was digging in a pipeline corridor and that he had hit something – he did not know that he had hit the Celanese pipeline.

It is uncontested that industry custom and practice, as well as Eby's contract, required Eby to investigate anything that it hit while digging in a pipeline corridor. Eby's failure to conduct the required investigation amounts to turning a blind eye to the damage that it caused. Eby's knowledge that it had hit something, and its disregard of its obligation to investigate what, satisfies whatever intent element is necessary for arranger liability under CERCLA.

STATEMENT OF THE CASE

The United States District Court for the Southern District of Texas had subject matter jurisdiction of this case pursuant to 28 U.S.C. § 1331 and 42 U.S.C.

§ 9613(b), in that Celanese sought cost recovery pursuant to § 107(a)(3) of CERCLA. The District Court had supplemental jurisdiction pursuant to 28 U.S.C. § 1367 of the state law claim asserted.

In 1979, the Coastal Water Authority of Texas (CWA) contracted with Eby to install an underground water pipeline from Clear Lake, Texas to Bayport Marine Terminal in Harris County, Texas. The pipeline had to cross several underground pipelines, including Celanese's methanol pipeline. To install the new pipeline, Eby first excavated an area, thereby uncovering the pipelines in that area. Eby then ran the new pipeline underneath the existing pipelines. After installing a segment, Eby backfilled that area and repeated the process with the next segment.

While excavating the area with a backhoe, an Eby employee struck and damaged the Celanese pipeline. The District Court found as a matter of fact that this strike was the sole cause of the ultimate methanol spill. It also found as a matter of fact that the backhoe operator knew he had hit something, but did not know what that something was. Instead, he backfilled the excavation, and the damage to the Celanese line remained unknown at that time. At trial, Celanese attempted (but failed) to prove that Eby and its employees knew that they had damaged the Celanese pipeline.

Eby understood that it had an obligation to protect the pipelines that it was crossing. It is the uncontradicted testimony of Eby's own employees that the industry custom and practice is to assume that any strike in a pipeline corridor has hit a pipeline. The operator must investigate and, if there is damage to a pipeline, the operator must report to the owner so that repairs may be made. Eby's

contract with the CWA so provided. In this instance, Eby made no investigation before it backfilled the area and it made no report of the strike to Celanese.

Over the years, the damaged area of the pipe deteriorated in a process known as stress corrosion cracking. Eventually, one of the cracks in the dented area penetrated the wall of the pipe, allowing methanol to leak from the pipe during each methanol transfer. Celanese discovered the leak on October 1, 2002, when an inspector observed and reported a patch of dead grass at the site. Celanese repaired the pipeline. Working under the oversight of the Texas Commission on Environmental Quality (TCEQ), Celanese also took action to prevent the contamination of a nearby stream and to clean up methanol contamination in the soil and groundwater. To date, Celanese has removed over 200,000 gallons of methanol at cost in excess of $4 million.

After trial, the District Court found that Eby had indeed hit the Celanese pipeline; that the strike was the sole cause of the methanol spill; and that Celanese was in no way responsible for the spill. The District Court also found that Eby did not know it had hit the pipeline and, solely on that basis, exonerated it from CERCLA arranger liability.

Celanese filed a Rule 59(e) motion to alter or amend the judgment. The motion argued that, as a matter of law, the facts found by the District Court compelled a finding of CERCLA arranger liability. Accepting the District Court's factual findings in full, Celanese argued that the only way Eby could have remained ignorant about what it hit was to turn a blind eye. Celanese argued that such conscious disregard for its obligations satisfied whatever intent requirements CERCLA imposes on arrangers. The

District Court disagreed, holding that "Eby did not know that the Celanese line had been damaged, so that there is no basis to infer that Eby had an 'intent to dispose.'"

REASONS FOR GRANTING THE WRIT

I. THERE IS A SUBSTANTIAL AND LONG-LASTING CIRCUIT SPLIT ON THE INTENT REQUIRED FOR CERCLA ARRANGER LIABILITY.

The intent required for arranger liability under CERCLA is a complete morass. This Court has addressed the issue only once, in *Burlington Northern Santa Fe Ry. v. United States*, __ U.S. __, 129 S. Ct. 1870 (2009). The issue in *Burlington Northern* was whether Shell Oil, the manufacturer of a useful product, was an "arranger" merely because it knew that spills and leaks would result from its sale. In that context, the Court held that "knowledge alone is insufficient to prove that an entity 'planned for' the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product." __ U.S. __, 129 S. Ct. at 1880.

In the instant case, the Fifth Circuit read *Burlington Northern* to require specific intent in all arranger cases, not just those involving the sale of a useful product. "Eby is liable as an arranger only if it took intentional steps or planned to release methanol from the Celanese pipeline." App. 8a. Eby was not liable, the Fifth Circuit concluded, "because it did not plan or take any intentional steps to release methanol from the Celanese pipeline." App. 4a. Since Eby had a less culpable *mens rea* than did Shell Oil, the Fifth Circuit read *Burlington Northern* to bar Celanese's action. App. 9a.

The Sixth and Seventh Circuits have also read CERCLA to require specific intent to dispose of hazardous substances as an element of arranger liability:

> Detrex hired a transporter, all right, but it did not hire it to spill TCE on Elkhart's premises. Although the statute defines disposal to include spilling, the critical words for present purposes are "arranged for." The words imply intentional action. The only thing that Detrex arranged for Transport Services to do was to deliver TCE to Elkhart's storage tanks. It did not arrange for spilling the stuff on the ground.

Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 751 (7th Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994). *Accord*, *United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1231 (6th Cir. 1996) ("requisite inquiry is whether the party intended to enter into a transaction that included an 'arrangement for' the disposal of hazardous substances").

Courts in those circuits require specific intent even outside the context of a useful product. In *United States v. Odabashian*, 1999 WL 33944046 (W.D. Tenn. Mar. 22, 1999), the Court stressed that "the relevant inquiry in determining whether Universal is liable as an arranger is whether Universal *intended* to arrange for waste disposal." 1999 WL 33944046 at *8 (emphasis original). The parties' "arguments with respect to Universal's 'control' over the disposal process are misguided," because liability as an arranger "hinges on the question of intent." *Id.* at *10 n.9. *Accord*, *RSR Corp. v. Avanti Dev., Inc.*, 69 F. Supp. 2d 1119, 1126 (S.D. Ind. 1999) ("transaction must have been for the purpose of discarding the hazardous substances").

The Third, Eighth and Eleventh Circuits have explicitly rejected the specific intent requirement. *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 679 n.6 (3rd Cir. 2003) ("specific intent or at least specific knowledge of the waste disposal . . . is higher than the general knowledge level we require"); *United States v. TIC Investment Corp.*, 68 F.3d 1082, 1089 (8th Cir. 1995), *cert. denied*, 519 U.S. 808 (1996) ("arranger liability under § 9607(a) does not impose the specific intent requirement"; officer is liable "if he or she had the authority to control and did in fact exercise actual or substantial control" over disposal); *South Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402, 407 (11th Cir. 1996) (declining to follow *Cello-Foil* and *Detrex*, and holding that, while "factors such as a party's knowledge (or lack thereof) of the disposal . . . and intent are relevant to determining whether there has been an 'arrangement' for disposal, they are not necessarily determinative").

The Ninth Circuit has "extended liability under section 107(a)(3) . . . to persons who have no control over the process leading to release." *Cadillac Fairview/California, Inc. v. United States*, 41 F.3d 562, 565 (9th Cir. 1994). By contrast, in the Second Circuit, "Congress employed traditional notions of duty and obligation" in defining arranger liability so the test is whether the defendant has "the *obligation* to exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal of hazardous substances." *General Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992) (emphasis original).

Burlington Northern does not resolve this circuit split, because it dealt with the distinction between the sale of a useful product and the disposal of hazardous substances. In that context, the specific intent of the seller does play a critical role. For example, the manufacturers of the PCB transformers in *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990), were selling a useful product and hence not arranging for the disposal of the PCBs. By contrast, when GE sold used PCBs to a dragstrip for dust control, *New York v. General Electric Co.*, 592 F. Supp. 291 (N.D.N.Y. 1984), it was much easier for the Court to conclude that GE wanted to rid itself of hazardous waste.

Arranger liability, however, "encompasses a wide range of arrangements" that have nothing to do with the useful product distinction. *CPC Int'l, Inc. v. Aerojet-General Corp.*, 759 F. Supp. 1269, 1279 (W.D. Mich. 1991). Specific intent has no place in the context of this case, which involves a company that caused a methanol spill by turning a blind eye to what it had done. *Burlington Northern*:

> discuss[es] arranger liability in the context of the manufacturing, sale and eventual disposal of hazardous chemicals. The determinative issue in assigning liability in those cases focuses on possession of the hazardous waste either as the manufacturer or the end-state consumer. Here we have a different scenario, where USACE's liability, if any, will not be based on actual possession of the waste but rather on what level of involvement the USACE engaged in when granting permits for dredging and disposing of dredged materials.

United States v. Washington State Dep't of Transportation, 665 F. Supp. 2d 1233, 2141 (W.D. Wash. 2009).[1]

Specific intent is not dispositive outside of the difference between the sale of a useful product and the disposal of hazardous substances. In the Second and Eighth Circuits, Eby would be liable as an arranger for causing the leak and disregarding its obligation to investigate, discover and fix the damage it had done. In the Fifth, Sixth and Seventh Circuits, it would not be. That is precisely the kind of circuit split that requires this Court's attention.

II. IN NUMEROUS OTHER CONTEXTS, THIS COURT HAS RECOGNIZED THAT CONSCIOUS DISREGARD OF THE CONSEQUENCES OF ONE'S CONDUCT IS THE EQUIVALENT OF INTENTIONAL CONDUCT.

Assuming that arranger liability has an element of intent, in every other context in which this Court has considered the issue, it has held that deliberate ignorance or conscious disregard of the consequences of one's actions is the equivalent of intent. To serve the ultimate purpose of CERCLA – imposing liability on those who pollute – it is essential to apply that rule here.

"Deliberate indifference" is "tantamount to intent." *Bryan County Comm'rs v. Brown*, 520 U.S. 397, 419 (1997) (Souter, J., dissenting), and cases there cited. In the context of punitive damages, the Court has long held that "reckless indifference to the rights of

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[1] All of the cases cited in *Burlington Northern* arose in the context of the useful product issue. 129 S. Ct at 1878-79.

others" is "equivalent to an intentional violation of them." *Barry v. Edmunds*, 116 U.S. 550, 563 (1886). Title IX imposes liability on school districts that "intentionally acted in clear violation" of the statute by "remaining deliberately indifferent" to harassment. *Davis v. Monroe County Board of Educ.*, 526 U.S. 629, 642 (1999). A municipality violates § 1983 by "deliberate indifference to the constitutional rights of its inhabitants." *City of Canton v. Harris*, 489 U.S. 378, 392 (1989). In a money laundering case, "the Government will be entitled to a willful blindness instruction" if the defendant "deliberately avoids learning the truth." *United States v. Santos*, 553 U.S. 507, 521 (2008).

Courts other than the Fifth Circuit have applied that principle to impose arranger liability on PRPs. In *United States v. Aceto Agri. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989), several manufacturers hired Aidex to mix technical grade pesticides with inert ingredients to produce a final product suitable for use in the field. The complaint alleged that "the generation of pesticide-containing wastes is *inherent* in the pesticide formulation process." 872 F.2d at 1379 (emphasis original). As a result, "Aidex could not formulate defendants' pesticides without wasting and disposing of some portion of them." *Id.* Relying on the liberal construction of CERCLA, the Eighth Circuit held that the complaint stated a claim for arranger liability:

> Any other decision, under the circumstances of this case, would allow defendants to simply "close their eyes" to the method of disposal of their hazardous substances, a result contrary to the policies underlying CERCLA.

872 F.2d at 1382, *citing United States v. Ward*, 618 F. Supp. 884, 895 (E.D.N.C. 1985) (allowing PRPs to escape arranger liability by turning a blind eye "would encourage exactly the type of blatant disregard for the consequences of hazardous waste disposal that occurred here").

In *TIC*, White Farm Equipment (WFE) entered into a contract with HEC to dispose of wastes on HEC's land. TIC subsequently bought WFE which continued to deposit waste on HEC's land. The District Court held that TIC's principal was liable as an arranger for the continuing waste disposal.

The principal argued that he could not have the requisite intent to be liable as an arranger because neither he "nor any employees of the TIC entities had any personal knowledge of the HEC disposal contract or the disposal practices at the dumpsite." 68 F.3d at 1087. The Eighth Circuit affirmed the principal's arranger liability. Rejecting the principal's "lack of personal knowledge" argument, the court held:

> From a policy standpoint, such a holding would violate the goals underlying CERCLA by creating a loophole for powerful individuals like Geogoulis. A corporate officer, who has virtually unlimited control over a company and in fact exercises that control but knows well enough to close his or her eyes to the specific details of the company's hazardous waste disposal practices, could avoid CERCLA liability . . . .

Id. at 1089. *Accord*, *Catellus Dev. Corp. v. United States*, 34 F.3d 748, 752 (9th Cir. 1994).

Such an interpretation of CERCLA is essential to serve the statutory purpose: to "promote the timely clean-up of hazardous waste sites and to ensure

that the costs of such clean-up efforts [a]re borne by those responsible for the contamination." *Burlington Northern*, 129 S. Ct. at 1874 (internal punctuation omitted). The District Court squarely found that the sole cause of the release was the damage that Eby did in 1979, so it is the party "responsible for the contamination." *Id.*

Indeed, the very purpose of arranger liability is "to prevent defendants from simply closing their eyes to the method of disposal" of hazardous wastes. *Agere Systems, Inc. v. Advanced Environ. Tech. Corp.*, 2006 WL 3366167 (E.D. Pa. Nov. 17, 2006) at *7 (internal punctuation omitted):

> To countenance AETC's approach would encourage companies to remain consciously ignorant about the treatment and disposal of their waste and thus would be inconsistent with CERCLA's general purpose and overwhelmingly remedial statutory scheme.

Id. (internal punctuation omitted).

Conversely, if Eby is not liable for the release it caused, no one is. The District Court specifically found that Celanese's conduct did not contribute to the release. App. 16a. Allowing the responsible party to escape altogether, while imposing substantial costs on an entirely innocent party (Celanese) and the taxpayers is "hardly commanded by CERCLA's text and is surely at odds with CERCLA's objective – to place the cost of remediation on persons whose activities contributed to the contamination rather than on the taxpaying public." *Burlington Northern*, 129 S. Ct. at 1885 (Ginsburg, J., dissenting).

If the Fifth Circuit is correct, the following types of parties could avoid CERCLA liability:

- A party that contracts with a toll manufacturer "unaware" that the disposal of hazardous substances was inherent in the manufacturing process.
- A corporate officer with virtually unlimited control over a company who exercises that control but closes her eyes to the specific details of the company's hazardous waste disposal practices. *See TIC*, 68 F.3d at 1089.
- A party who accumulates outdated drums of product that deteriorate and leak hazardous substances.
- A truck driver who strikes something while backing up in a drum staging area, but does not stop to investigate, with the result that damaged drums spill their contents.
- A truck driver hauling both hazardous and non-hazardous waste who hears something fall off the truck, but does not stop to investigate what it was.
- A demolition/remediation contractor that negligently samples transformer oil and manifests the oil shipments as non-hazardous when they are actually PCB-contaminated, resulting in the contamination of several recycling facilities to which the oil is shipped. *See Mainline Contracting Corp. v. Chopra-Lee, Inc.*, 109 F. Supp. 2d 110 (W.D.N.Y. 2000).

- A party that mistakenly pumps 2,000 gallons of gasoline into a groundwater monitoring well instead of a gasoline tank, thereby polluting an aquifer. *See Modern Sewer Corp. v. Nelson Distributing, Inc.*, 109 P.3d 11 (Wash. App. 2005).

If those responsible for contamination can escape liability through a strategy of willful ignorance, this will discourage other parties, such as Celanese, from stepping forward promptly to address contamination, out of concern they will be unable to obtain reimbursement. This will place the burden of remediation on government agencies, which will similarly be unable to obtain reimbursement from the responsible party. Eby, the party responsible for the methanol contamination, should not be allowed to escape liability for cleanup costs because it remained willfully ignorant of the pipeline damage it caused.

Based on the District Court's factual findings, the sole entity responsible for this spill was Eby. Accepting the District Court's factual finding that Eby did not know that it hit the Celanese pipeline, the only reason is that it deliberately turned a blind eye to the damage it did. CERCLA should punish such conduct, not reward it.

III. THE ALTERNATIVE HOLDING OF WAIVER IS CONTRARY TO BOTH THE DISTRICT COURT'S HOLDING AND THE FOURTH CIRCUIT'S CROFTON VENTURES OPINION.

The Fifth Circuit alternatively held that Celanese had waived its conscious disregard theory because it tried the case on the theory that "Eby had actually known that it struck and damaged the Celanese

pipeline and then attempted to cover it up." App. 5a. In its ruling on the Rule 59 motion, the District Court observed that "Celanese argues, as it did at trial, that Eby is an 'arranger' whether or not they intended to dispose of the methanol." App. 24a.

So the issue is whether Celanese has waived its rights to recover on a conscious disregard theory that the facts unquestionably support by attempting to prove more than it was legally required to prove. The Fifth Circuit's holding conflicts with the Fourth Circuit's holding in *Crofton Ventures L.P. v. G&H Partnership*, 258 F.3d 292 (4th Cir. 2001). There, Crofton bought property from G&H that turned out to be contaminated with TCE. The principal focus of the trial was whether G&H was the party that had deposited the TCE drums on the property during its ownership. In closing argument after a bench trial, Crofton argued that G&H was also liable if the TCE had leaked into the environment during G&H's ownership of the land.

The District Court held that this was a new theory of liability and refused to consider it. The Fourth Circuit reversed:

> [A] review of the complete record does not disclose that Crofton advanced a new theory of liability for the first time at the end of closing argument. The "bombshell" that counsel for Crofton "dropped" was their advice to the district court that the court was reading CERCLA too narrowly, failing to recognize that "disposal" includes "leaking." . . . And while counsel acknowledged that their attempt to prove the defendants' actual dumping would present a stronger case for Crofton, they argued that Crofton could meet its burden of establishing

> liability under CERCLA simply by showing that hazardous wastes "leaked" onto the land while owned by the defendant. But this was not a new theory; it was rather a lesser included burden of proof.

258 F.3d at 298 n.3. *Accord, Detrex,* 2 F.3d at 751 ("Detrex had argued to the district court on a variety of grounds that it was not . . . an arranger" and "that it did not marshal in support of this ground all the relevant legislative provisions and history did not work a forfeiture").

CONCLUSION

For these reasons, Celanese respectfully prays that the Court grant its petition for writ of certiorari to the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-20487

CELANESE CORPORATION,
Plaintiff-Appellant,

v.

MARTIN K EBY CONSTRUCTION COMPANY INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(Houston Division)

Before JONES, Chief Judge, and
HIGGINBOTHAM and ELROD, Circuit Judges.

JENNIFER WALKER ELROD, Circuit Judge:

At issue is whether Eby is liable as an "arranger" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a)(3), and the Texas Solid Waste Disposal Act (SWDA), Tex. Health & Safety Code § 361.344. We hold that Eby is not an arranger, and we AFFIRM the district court's final judgment, denying recovery to Celanese, and we AFFIRM the district court's denial of Celanese's motion to alter that judgment pursuant to Federal Rule of Civil Procedure 59(e).

I.

The parties tried the CERCLA claim to the bench and the SWDA claim to the jury. Under SWDA, litigants are entitled to have a jury act as the fact-finder. *See R.R. Street & Co. Inc. v. Pilgrim Enter., Inc.*, 166 S.W.3d 232, 237 (Tex. 2005). In a CERCLA case, the findings of a jury are only advisory. *See id.* Unless otherwise indicated, the relevant facts regarding the underlying events are taken from the jury's findings and the district court's findings. They are uncontested on appeal.

In 1979, the Coastal Water Authority of Texas (CWA) contracted with Eby to install an underground water pipeline from Clear Lake, Texas to Bayport Marine Terminal in Harris County, Texas. The pipeline was to cross several underground pipelines, including Celanese's methanol pipeline. To accomplish this, Eby first excavated an area to install a pipeline segment, thereby uncovering the pipelines in that area. Eby then ran its own pipeline underneath those pipelines. After installing a segment, Eby backfilled that area and repeated the process with the next segment.

While excavating the area containing Celanese's pipeline, an Eby employee struck and damaged that pipeline with a backhoe. That employee did not know what he had struck, and there was no contemporaneous report of the incident. Neither Eby nor any of its employees knew that the work on the CWA pipeline had damaged the Celanese pipeline.

According to Celanese, "Over the years, the dented areas of the pipe deteriorated in a process known as stress corrosion cracking. Eventually, one of the cracks in the dented area penetrated the wall of the

pipe, allowing methanol to leak from the pipe during each methanol transfer." Celanese discovered the leak on October 1, 2002, when someone observed and reported a patch of dead grass at the site. Soon after discovering the leak, Celanese fixed the pipeline. Celanese also worked with state and federal agencies to clean up the site and to prevent the contamination of nearby groundwater. As of mid-November 2008, Celanese had removed and disposed of over 232,028 gallons of methanol from the subsurface at the site. The exact amount of released methanol is unknown.

Celanese sued Eby under CERCLA and SWDA to recover its clean-up costs. Liability hinges on whether Eby was an arranger under those statutes. Both the jury and the district court found that "[t]he release at the Site would not have occurred but for the 1979 damage to the Celanese methanol line." The court nonetheless held that Eby was not liable as an arranger under CERCLA or SWDA because Eby did not know that it had damaged the Celanese pipeline and because "Eby is not a person responsible for solid waste under the SWDA." Accordingly, the court entered a take-nothing final judgment on Celanese's claims.

Celanese filed a motion under Rule 59(e) to alter or amend that judgment, which the district court denied. Celanese timely appealed the final judgment and the denial of its Rule 59(e) motion. On appeal, Celanese contends that the common law of negligence, industry custom and practice, and Eby's contract with the CWA "imposed on Eby the obligation to investigate what it hit in a pipeline corridor and rectify any damage." According to Celanese, Eby "consciously disregarded" that obligation by failing to investigate the incident and is therefore liable under

CERCLA and SWDA as a matter of law. Celanese does not challenge any factual findings of the district court or the jury.

II.

Because the sole issue here is whether the district court erred as a matter of law regarding arranger liability, our review is *de novo*. *See Cox v. City of Dallas*, 256 F.3d 281, 288 (5th Cir. 2001) (citation omitted). Although this court generally reviews a decision on a motion to amend or alter the judgment for abuse of discretion, insofar as the decision reconsidered a question of law, our review is *de novo*. *Elementis Chromium L.P. v. Coastal States Petroleum Co.*, 450 F.3d 607, 610 (5th Cir. 2006) (citations omitted). Such motions "cannot be used to raise arguments which could, and should, have been made before the judgment issued and cannot be used to argue a case under a new legal theory." *Id.* (citation and internal quotation marks omitted).

As a threshold matter, we find that Celanese has waived its conscious-disregard argument. Furthermore, even if the argument were not waived, Eby still would not be liable as an arranger under CERCLA or SWDA because it did not plan or take any intentional steps to release methanol from the Celanese pipeline.

A.

Celanese did not try its case before the district court on a conscious-disregard theory; thus the argument is waived. The general rule of this court is that arguments not raised before the district court are waived and will not be considered on appeal. *See AG Acceptance Corp. v. Veigel*, 564 F.3d 695, 700 (5th Cir. 2009). The Joint Pretrial Order and the Verdict Form show that Celanese did not seek a finding on

conscious disregard. Rather, as the Joint Pretrial Order demonstrates, Celanese tried this case on an entirely different theory — that Eby had actually known that it had struck and damaged the Celanese pipeline and then attempted to cover it up. Along the same lines, Celanese did not propose any questions to the jury regarding conscious disregard. Instead, the jury questions focus on (1) whether "the Celanese methanol line was damaged as a result of the actions of Eby in 1979," (2) whether "Eby knew that it damaged the Celanese methanol line in 1979," and (3) whether Eby "decided to backfill the excavation . . . knowing that the 1979 damage to the Celanese methanol line could result in a leak."[1] For this reason alone, Celanese cannot prevail.

B.

Alternatively, we hold that Celanese's conscious-disregard allegations do not establish arranger liability under CERCLA. Congress enacted CERCLA to address the "serious environmental and health risks posed by industrial pollution," and CERCLA "was designed to promote the 'timely cleanup of hazardous

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[1] The district court ruled on this case prior to the Supreme Court's decision in *Burlington N. & Santa Fe Ry. Co. v. United States*, — U.S. —, 129 S Ct 1870 (2009) At the time, the prevailing rule of this circuit for arranger liability required "a nexus" between the defendant's conduct and the disposal of the hazardous substance. *Geraghty & Miller, Inc. v. Conoco Inc* , 234 F.3d 917, 929 (5th Cir. 2001) The district court's ruling — that Celanese must demonstrate that Eby actually knew about the disposal — was based on *Geraghty*. As explained in greater detail below, *Burlington* rejected this lesser standard and held that arranger liability requires an intent to dispose *See* 129 S Ct at 1879-80 Having waived its conscious-disregard argument under *Geraghty*, Celanese has also waived its argument under the more demanding standard of *Burlington*

waste sites' and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *Burlington N. & Santa Fe Ry. Co. v. United States*, — U.S. —, 129 S. Ct. 1870, 1874 (2009) (citation omitted). To accomplish this, CERCLA imposes strict liability for environmental contamination upon four broad classes of potentially responsible parties:

> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . .

42 U.S.C. § 9607(a). This appeal concerns only the third category — whether Eby "arranged for disposal" of methanol, which the parties agree is a "hazardous substance." CERCLA does not specifically define

what it means to "arrang[e] for" the disposal of a hazardous substance. Accordingly, we must interpret that phrase according to its ordinary meaning. *Burlington*, 129 S. Ct. at 1879 (citation omitted).

In *Burlington*, the Supreme Court addressed this very question with respect to a chemical supplier that had used common carriers to ship hazardous substances to its customers. *See id.* at 1875. During these shipments, leaks and spills of the chemicals often occurred, which the supplier knew about. *See id.* Because the supplier arranged the deliveries and knew that chemical leaks and spills would occur as a result, the Ninth Circuit held that the supplier was liable as an arranger under CERCLA even though it had not specifically intended to dispose of the product: "Thus, an entity can be an arranger even if it did not intend to dispose of the product. Arranging for a transaction in which there necessarily would be leakage or some other form of disposal of hazardous substances is sufficient." *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 949 (9th Cir. 2008), *rev'd, Burlington*, 129 S. Ct. 1870.

The Supreme Court reversed this holding because the Ninth Circuit's interpretation of "arranged for" conflicted with the plain language of the statute. *See Burlington*, 129 S. Ct. at 1879-80 ("[CERCLA] liability may not extend beyond the limits of the statute itself."). The Court explained,

> In common parlance, the word "arrange" implies action directed to a specific purpose. *See* Merriam-Webster's Collegiate Dictionary 64 (10th ed. 1993) (defining "arrange" as "to make preparations for: plan[;] . . . to bring about an agreement or understanding concerning"); *see also Amcast Indus. Corp.*, 2 F.3d at 751 (words

> "'arranged for' . . . imply intentional action"). Consequently, under the plain language of the statute, an entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance. *See Cello-Foil Prods., Inc.*, 100 F.3d at 1231 ("[I]t would be error for us not to recognize the indispensable role that state of mind must play in determining whether a party has 'otherwise arranged for disposal . . . of hazardous substances'").

Id. at 1879. Accordingly, the Supreme Court held that an entity's knowledge that its action will result in a spill or leak is insufficient, by itself, to establish arranger liability; instead, the entity must "take[] intentional steps" or "plan[] for" the disposal of the hazardous substance. *Id.* at 1879-80. Hence, under *Burlington*, Eby is liable as an arranger only if it took intentional steps or planned to release methanol from the Celanese pipeline.

The record does not support such a finding. The district court found, and Celanese does not dispute, that Eby did not intentionally damage the pipeline. In fact, Eby did not even know that it had struck a pipeline; it only knew that it had struck something with a backhoe. Still, Celanese insists that Eby intentionally took steps to dispose of methanol by disregarding its obligations to investigate the incident and backfilling the excavated area where the incident had occurred. In other words, Celanese argues that Eby's conscious disregard of its duty to investigate is tantamount to intentionally taking steps to dispose of methanol. *Burlington*, however, precludes liability under these circumstances.

In *Burlington*, the Court declined to impose arranger liability for a defendant with more culpable *mens rea*. The defendant had actually arranged to ship hazardous chemicals under conditions that it knew would result in the spilling of a portion of the hazardous substance by the purchaser or common carrier. *See Burlington*, 129 S. Ct. at 1880. Given that there was no arranger liability under those circumstances, we fail to see how we can impose such liability here when Eby did not even know that it had struck the Celanese pipeline. Therefore, we hold that Eby is not liable as an arranger under CERCLA.

Because we find that Eby is not liable as an arranger under CERCLA, we also find that it is not liable as an arranger under SWDA, the Texas "counterpart" to CERCLA. *R.R. Street & Co. Inc. v. Pilgrim Enter., Inc.*, 166 S.W.3d 232, 238, 241 (Tex. 2005). The Texas Supreme Court has yet to consider SWDA arranger liability in light of *Burlington*. Therefore, we must determine how the Texas Supreme Court would likely resolve the issue post-*Burlington*. *See Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 229 (5th Cir. 2010) (citation omitted). Here, the Texas Supreme Court has explicitly instructed that we should look to "federal case law for guidance in interpreting the term 'otherwise arranged' to dispose of solid waste, which is not defined in either SWDA or CERCLA." *R.R. Street*, 166 S.W.3d at 241. In light of this instruction, which this court must of course heed in making an *Erie* guess, we are confident that the Texas Supreme Court would apply *Burlington* to Celanese's SWDA claim. Accordingly, consistent with our CERCLA analysis above, we also hold that Eby is not liable as an arranger under SWDA.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-06-2265

CELANESE CORPORATION,
Plaintiff,

vs.

COASTAL WATER AUTHORITY,
KELLOGG, BROWN & ROOT INC., and
MARTIN K. EBY CONSTRUCTION CO., INC.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff Celanese Corporation sued defendants[1] Kellogg, Brown & Root, Inc. and Martin K. Eby Construction Co., Inc. to recover environmental clean-up costs under the Texas Solid Waste Disposal Act, TEX. HEALTH & SAFETY CODE § 361.344 (SWDA) and the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9607 (CERCLA).

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[1] All claims against a third defendant, Coastal Water Authority, were dismissed by orders dated February 9, 2007 (Dkt 45) and July 2, 2008 (Dkt 108).

A jury trial was conducted March 9-20, 2009. The jury returned a verdict on the SWDA claim, and its findings of fact are advisory only with respect to the CERCLA claim. The court now makes the following findings of fact and conclusions of law. Any finding of fact that should be a conclusion of law is deemed a conclusion of law, and vice versa.

Findings of Fact

1. Plaintiff Celanese Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Dallas, Texas.

2. Defendant Kellogg, Brown & Root, LLC (Brown & Root) is the successor to Brown & Root, Inc. and is a company organized and existing under the laws of the State of Delaware, with its principal place of business in Houston, Texas.

3. Defendant Martin K. Eby Construction Co., Inc. (Eby) is the successor to Chisholm Trail Construction Co., Inc. and is a corporation organized and existing under the laws of the State of Kansas, with its principal place of business in Wichita, Kansas.

Spill Site

4. The site of the methanol spill generating this lawsuit is located approximately 1/2-mile southeast of the intersection of State Highway 146 and Shoreacres Boulevard, near Bayport Industrial Complex in eastern Harris County, Texas. The property is bounded by the Taylor Bayou small boat channel to the west and by a marine terminal owned by LBC-Houston, LP to the east (hereafter Site).

5. The methanol leaked from a 10" pipeline installed by Celanese in 1971. This three-mile long pipeline originally ran between the Celanese Clear Lake plant and a barge terminal on Galveston Bay, but was partially rerouted in 1974 to a Bayport ship terminal. From at least 1974 to the present, the methanol pipeline passed through corridors and easements belonging to Friendswood Development Corp. and managed by Exxon Pipeline Company.

6. From 1971 to the time of trial, Celanese has been the sole owner and operator of the methanol pipeline.

CWA Water Pipeline Project

7. In 1979, Coastal Water Authority (CWA), a state agency that supplies industries with water, built a 30" underground water pipeline to serve Bayport industrial plants. The CWA waterline crossed underground pipelines owned by many different companies, including Celanese, in many places.

8. The Site where the leak occurred is near one of the intersections of the CWA water pipeline and the methanol pipeline.

9. CWA hired Brown & Root to provide engineering services on the water pipeline project, to assist with the preparation of a bid package for prospective contractors, and to inspect the work of the successful bidder for CWA.

10. Brown & Root recommended acceptance of Eby's bid as construction contractor for installation of the CWA water pipeline.

11. Brown & Root was contractually required to observe Eby's construction of the CWA line on a daily basis, and in particular was required to inspect each section of the CWA line as it was laid. Brown & Root had contractual authority to direct Eby to stop work on the project in appropriate circumstances.

12. Eby's normal procedure was to notify pipeline owners when Eby planned an excavation in the vicinity of their pipelines. Likewise, it was Celanese's normal practice to have a representative present when they knew anyone would be digging near its pipelines.

Damage to the Methanol Line

13. On April 27, 1979, Celanese received a telephone call from Eby representatives advising that the CWA water line would cross under Celanese pipelines adjacent to Hwy. 146.

14. In July 1979, Eby began excavating the Site where the CWA waterline, running east and west, was to cross under the Celanese methanol line, which ran north and south.

15. At that time, the project was a few weeks behind schedule due to unusually heavy rainfall. Eby added a second pipe laying crew, and the work was eventually completed on schedule.

16. Eby's excavation at the Site exposed only a portion of the Celanese methanol pipeline, which was approximately twelve (12) feet below ground surface.

17. During that excavation, an unknown Eby employee operating a backhoe struck and damaged the methanol pipeline.[2]

18. The dent in the methanol pipeline was approximately 10-15 feet south of the CWA water line, and approximately 8 feet above it.

19. The dented portion of the pipeline was neither exposed nor in plain view prior to backfilling.

Lack of Knowledge

20. The 1979 strike on the Celanese methanol pipeline was not contemporaneously reported or recorded by Eby, Brown & Root, Celanese, or anyone else.

21. According to Celanese expert witness Ross Benson, who has operated heavy equipment for nearly 40 years, a backhoe operator with his level of experience knows when he hits a pipeline, as opposed to a rock or some other object.

22. There is no evidence that the Eby employee who damaged the methanol pipeline in 1979 had Benson's level of experience operating heavy equipment.

23. Eby operator Weldon Booker was moderately experienced on heavy equipment by 1979, but he could not always tell the difference between hitting metal or rock, and would have to probe with a shovel to discover what had been hit.

24. Booker was not operating the backhoe when the Celanese methanol line was struck. He had previously been relieved from backhoe duty

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[2] This finding adopts the jury's advisory answer to Question No. 1.

because he accidentally turned over a backhoe while working near the Taylor Bayou small boat channel.

25. Even when Booker was the main operator of the backhoe, other members of the crew (except for laborers) would occasionally operate the machine.

26. The Eby employee who struck the pipeline did not know what he had hit.

27. Neither Eby nor any of its employees knew that the Celanese methanol line had been damaged by its work on the CWA line.[3]

28. Eby's decision to backfill the excavation was made without knowledge that the Celanese methanol line had been damaged.[4]

29. Neither Brown & Root nor any of its employees knew that Eby had damaged the Celanese methanol line.[5]

30. Brown & Root's decision to allow Eby to backfill the excavation was made without knowledge that the Celanese methanol line had been damaged.[6]

Causation of Methanol Release

31. The release of methanol at the Site would not have occurred but for the 1979 damage to the Celanese methanol line.[7]

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[3] The court adopts the jury's advisory answer to Question No. 2

[4] The court adopts the jury's advisory answer to Question No. 4.

[5] The court adopts the jury's advisory answer to Question No. 3

[6] The court adopts the jury's advisory answer to Question No. 5

[7] The court adopts the jury's advisory answer to Question No. 6

32. Celanese's acts or omissions in monitoring and maintaining the integrity of its methanol line did not contribute to the release in question.[8]

Celanese Response

33. Celanese discovered the methanol leak on October 1, 2002, when a patch of dead grass was observed at the Site. Defendants have not shown by preponderance of the evidence that Celanese acted unreasonably in failing to detect the release sooner.[9]

34. Celanese hired Benson Pipeline Maintenance to excavate down to the methanol line and find the source of the leak.

35. A CWA representative, Lee Casey, was present at the Site while Benson was excavating in the vicinity of the CWA waterline.

36. Brown & Root was notified by CWA in October 2002 of the leak, the excavation, and Celanese's intention to take steps to eliminate the release.

37. Celanese notified Eby of the leak and its efforts to eliminate the release in 2006, after it learned through discovery in this case that Eby was the contractor for installation of the CWA waterline in 1979. Neither Brown & Root nor CWA informed Celanese that Eby was the contractor prior to initiation of this lawsuit.

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[8] The court adopts, in part, the jury's advisory finding to Question No. 9. The court declines to adopt the jury's advisory answer to Question No 8, *i.e.*, that Celanese failed to use due care in monitoring and maintaining the integrity of the line. The defendants failed to sustain their burden of proof on that issue

[9] Respectfully, the court declines to adopt the jury's advisory answer to Question No. 10

38. Celanese replaced the damaged portion of the pipeline, pressure-tested the repaired pipeline, and backfilled the excavation.

39. As of mid-November 2008, Celanese had removed and disposed of over 232,028 gallons of methanol from the subsurface at the Site. The exact amount of methanol that leaked from the pipe before repair is unknown.

40. Celanese notified the National Response Center and Texas Commission on Environmental Quality (TCEQ) of its discovery of the methanol release.

41. Celanese, in accordance with TCEQ regulations known as the Texas Risk Reduction Program (TRRP), summarized its site evaluation in an Affected Property Assessment Report (APAR).

42. TCEQ approved the APAR and directed Celanese to prepare a Response Action Plan (RAP). Celanese's RAP proposed (a) establishment of a Plume Management Zone; and (b) monitored natural attenuation (MNA).

43. TCEQ approved the RAP on June 3, 2008. Once Celanese can demonstrate the effectiveness of the MNA remedy, it will submit a Response Action Completion Report.

44. Celanese has not yet received approval from TCEQ of a Response Action Completion Report or a Certificate of Completion from the TCEQ for the methanol contamination at the Site.

45. Celanese has not yet received a No Further Action letter from the TCEQ for the methanol contamination at the Site.

46. It will take longer than 4 years from January 1, 2009 to r ceive approval of a Response Action Completion Report or No Further Action letter from the TCEQ for the methanol contamination at the Site.

47. Brown & Root has not participated in the response to or clean-up of the methanol release.

48. Eby has not participated in the response to or clean-up of the methanol release.

Conclusions of Law

1. Claims under the SWDA § 361.344 and CERCLA § 107 are governed by the same principles. *R.R. Street & Co. v. Pilgrim Enter.*, 166 S.W.3d 232, 242-43 (Tex. 2005).

SWDA

2. The elements of a cost recovery action under SWDA are that (1) the defendant is a person responsible for solid waste; (2) the TCEQ approved the plaintiff's removal or remediation action; (3) the action was necessary to address a release or threatened release of solid waste; (4) the costs were necessary and reasonable; and (5) plaintiff made reasonable attempts to notify the defendant of both the release and plaintiff's intent to take steps to eliminate the release. *R.R. Street*, 166 S.W.3d at 240.

3. Celanese made reasonable attempts to notify Eby and Brown & Root of the release and of its intent to take steps to eliminate the release.

4. A person may be a person responsible under the SWDA if the person "otherwise arranged" for the disposal of a hazardous substance. TEX. HEALTH & SAFETY CODE § 361.271.

5. In order to hold a defendant liable as an arranger under the SWDA, there must be a nexus between the defendant's conduct and the disposal of the hazardous substance. *R.R. Street*, 166 S.W.3d at 242.; *Geraghty and Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 929 (5th Cir. 2000).

6. Arranger status is based on a person's authority, involvement, or obligation in regard to the disposal at issue. In evaluating arranger status, the court looks at the totality of circumstances in each case. The court's inquiry focuses on the defendant's actual control over the decision regarding the disposal. *R.R. Street*, 166 S.W.3d at 242-43.

7. Based on the jury's findings of fact, the court concludes that Eby is not a person responsible for solid waste under the SWDA.

8. Based on the jury's findings of fact, the court concludes that Brown & Root is not a person responsible for solid waste under the SWDA.

CERCLA

9. The elements of a cost recovery action under CERCLA are that (1) the site is a facility; (2) there was a release or threatened release of a hazardous substance from the facility; (3) the plaintiff incurred necessary costs of response; and (4) the defendants are responsible persons under 42 U.S.C. § 9607(a). *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989).

10. The methanol pipeline is a facility within the meaning of CERCLA § 101(9).

11. The methanol release was a release of a hazardous substance within the meaning of CERCLA § 101(14).

12. Brown & Root and Eby are "persons" within the meaning of CERCLA § 101(21).

13. A person may be a person responsible under CERCLA if the person "otherwise arranged" for the disposal of a hazardous substance. 42 U.S.C. § 9607(a)(3).

14. The methanal release is a disposal within the meaning of CERCLA § 101(29).

15. In order to hold a defendant liable as an arranger, there must be a nexus between the defendant's conduct and the disposal of the hazardous substance. *Geraghty and Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 929 (5th Cir. 2000).

16. In evaluating arranger status, the court considers a person's authority, involvement, or obligation in regard to the disposal at issue. The court looks at the totality of circumstances in each case. The court's inquiry focuses on the defendant's actual control over the decision regarding the disposal.

17. Knowledge that a process inherently results in a disposal can give rise to arranger liability. *Vine Street LLC v. Keeling*, 362 F. Supp. 2d 754, 760 (E.D. Tex. 2005); *U.S. v. Burlington Northern & Santa Fe Railway Co.*, 520 F.3d 918, 951 (9th Cir. 2008). Conversely, lack of knowledge may defeat a claim of arranger liability in a particular case. *See South Florida Water Manag. Dist. v. Montalvo*, 84 F.3d 402, 407- 09 (11th Cir. 1996).

18. Having found that Eby did not know that the Celanese methanol pipeline had been damaged, the court concludes that Eby is not liable to Celanese as an arranger for disposal of a hazardous substance under CERCLA.

19. Having found that Brown & Root did not know that the Celanese methanol pipeline had been damaged by Eby, the court concludes that Brown & Root is not liable to Celanese as an arranger for disposal of a hazardous substance under or CERCLA.

The court will issue a separate take-nothing final judgment on Celanese's claims.[10]

Signed at Houston, Texas on April 13, 2009.

Stephen Wm Smith
United States Magistrate Judge

[10] Having concluded that neither defendant is liable, the court declines to make further findings or conclusions regarding damages or allocation.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-06-2265

CELANESE CORPORATION,
Plaintiff,

VS.

COASTAL WATER AUTHORITY,
KELLOGG, BROWN & ROOT INC., AND
MARTIN K. EBY CONSTRUCTION CO., INC.,
Defendants.

FINAL JUDGMENT

In accordance with the Memorandum and Order issued February 9, 2007 (Dkt. 45), the Memorandum and Order issued July 2, 2008 (Dkt. 108), the March 20, 2009 jury verdict (Dkt. 201), and the Findings of Fact and Conclusions of Law issued this day, it is hereby

ORDERED that Celanese Corporation shall take nothing on all claims against all defendants in this case. This is a final judgment.

Signed at Houston, Texas on April 13, 2009.

Stephen Wm Smith
United States Magistrate Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-06-2265

CELANESE CORPORATION,
Plaintiff,

VS.

COASTAL WATER AUTHORITY,
KELLOGG, BROWN & ROOT INC., AND
MARTIN K. EBY CONSTRUCTION CO., INC.,
Defendants.

MEMORANDUM AND ORDER

Plaintiff Celanese moves pursuant to Federal Rule of Civil Procedure 59(e) to alter or amend the court's judgment of April 13, 2009 in favor of defendants KBR and Eby (Dkt. 215). Celanese's motion is denied.

"A Rule 59(e) motion 'calls into question the correctness of a judgment.'" *Templet v. Hydrochem, Inc.*, 367 F.3d 473, 478 (5th Cir. 2004) (quoting *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir. 2002)). Rule 59(e) is properly invoked "to correct manifest errors of law or fact or to present newly discovered evidence." *Id.* at 479. In deciding a motion to alter or amend judgment pursuant to Rule 59, a court must strike the proper balance between two competing judicial imperatives: the need to bring litigation to an end, and the need to render just

decisions on the basis of all the facts. *Templet*, 367 F.3d at 479; *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993).

Celanese argues, as it did at trial, that Eby is an "arranger" whether or not they intended to dispose of the methanol from Celanese's damaged line. Having found that an Eby worker hit the Celanese methanol line during installation of the CWA water line, Celanese argues that it does not matter whether or not Eby knew the line had been hit and therefore the court's legal conclusion that Eby is not arranger is erroneous.

Celanese has not pointed out any manifest error of law or fact that requires the court to alter or amend its judgment. The court's judgment is consistent with *Burlington Northern & Santa Fe Railway v. United States*, 129 S. Ct. 1870 (May 4, 2009), issued shortly after Celanese filed its motion. In *Burlington Northern*, the Supreme Court ruled, among other things, that arranger liability requires an intention to dispose of hazardous waste, and that "an entity's knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity's intent to dispose." *Id.* at 1879. Here, both court and jury found that Eby did not know that the Celanese line had been damaged, so there is no basis to infer that Eby had an "intent to dispose." At most, Celanese's argument that Eby should have investigated any hit while digging in a pipeline corridor amounts to a claim of negligence, and mere negligence is insufficient to trigger arranger liability under *Burlington Northern*.

The court is unmoved by Celanese's contention that if the court's ruling is allowed to stand, no party would be responsible for cleaning up the methanol

release. Nobody sued Celanese, and neither the court nor jury were asked to determine whether or how Celanese qualified for the third party defense under 42 U.S.C. § 9607(b).[1] Celanese cannot inject this issue into the case by a Rule 59 motion. *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990). It is therefore

ORDERED that Celanese's motion to alter or amend the court's judgment (Dkt. 215) is denied.

Signed at Houston, Texas on June 25, 2009.

Stephen Wm Smith
United States Magistrate Judge

[1] The third party defense was discussed extensively during the jury charge conference Celanese did not object and in fact concurred with the court's determination that for purposes of this case, the question of whether Celanese's actions contributed to the release went to the issue of allocations, and not to the liability of KBR or Eby. *See, e g* , Trial Transcript, March 18, 2009.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-24087

CELANESE CORPORATION,
Plaintiff - Appellant

v.

MARTIN K. EBY CONSTRUCTION
COMPANY, INCORPORATED,
Defendant - Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

---

ON PETITION FOR REHEARING EN BANC

(Opinion 9/20/10, 5 Cir., _____, _____, F.3d. _____)

Before JONES, HIGGINBOTHAM, and ELROD, *Circuit Judges*.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jennifer W. Elrod

* Judge Smith did not participate in the consideration of the rehearing en banc.

APPENDIX F

42 U.S.C. § 9607(a)

Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604 (i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of

(i) the date payment of a specified amount is demanded in writing, or

(ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

42 U.S.C. § 9601(29)

The terms "disposal", "hazardous waste", and "treatment" shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C. 6903].

42 U.S.C. § 6903(3)

The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or

water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

No. 10-958

In The

Supreme Court of the United States

CELANESE CORPORATION,

Petitioner,

v.

MARTIN K. EBY CONSTRUCTION CO., INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Petitioner brought this suit under Section 107(a)(3), 42 U.S.C. § 9607(a)(3), of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 *et seq.*, alleging respondent Eby and others decided to cover up damage to a pipeline, knowing the damage could result in a leak of a hazardous substance, and therefore Eby was an entity that "arranged for disposal" of hazardous substances. After judgment was entered on findings that Eby had no such knowledge and was therefore not an arranger, petitioner claimed Eby had a negligence-based obligation to investigate, and it consciously disregarded that obligation. The questions presented are:

1. Whether the court of appeals correctly held that petitioner had waived its conscious-disregard argument by not trying the case on that theory.

2. Whether the court of appeals properly affirmed the judgment on the ground that Eby did not take intentional steps or plan to dispose of a hazardous substance, particularly when it did not know it had struck petitioner's pipeline.

CORPORATE DISCLOSURE STATEMENT

Martin K. Eby Construction Company, Inc. is the successor to Chisholm Trail Construction, Inc. and is a subsidiary of Eby Corporation, a privately owned entity.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 620 F.3d 529. The opinion of the magistrate judge (Pet. App. 10a-21a) is reported at 2009 WL 981717.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 2010. A motion for rehearing en banc and for panel rehearing (Pet. App. 26a) was denied on October 26, 2010. The petition for a writ of certiorari was filed on January 24, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, defines four categories of persons who are potentially responsible parties, liable for the remediation of a release of a hazardous substance, for cost of response, and damages. One of the four categories of potentially responsible parties is an "arranger." 42 U.S.C. § 9607(a)(3). CERCLA does not specifically define who an arranger is, leaving it to

the courts to develop their own construction of the term. This Court has described the determination of arranger liability as fact intensive and case-specific. Still, 42 U.S.C. § 9607(a)(3) does require that a person "by contract, agreement, or otherwise" "arrange for disposal" of a hazardous substance. In *Burlington N. & Santa Fe Ry. Co. v. United States,* 129 S. Ct. 1870 (2009), this Court held that the statutory term "arrange for" "implies action directed at a specific purpose." *Burlington Northern* at 1879. Thus an arranger must intend or plan for the disposal of a hazardous substance to be liable under CERCLA.

2. a. In 1979, the Coastal Water Authority of Texas ("CWA") contracted with Eby to install an underground water pipeline that would serve industrial facilities at the Bayport Marine Terminal in Harris County, Texas. Pet. App. 2a. Kellogg, Brown & Root, Inc. was hired to provide engineering services to CWA, including inspection of Eby's work. Pet. App. 12a.

The CWA water pipeline was to cross several underground pipelines, including petitioner's methanol pipeline. To accomplish this, Eby first excavated an area to install a pipeline segment, thereby uncovering the pipelines in that area. Eby then ran its own pipeline underneath those pipelines. After installing a segment, Eby backfilled that area and repeated the process with the next segment. Pet. App. 2a.

b. While excavating the area near petitioner's pipeline, an Eby employee struck and damaged that pipeline with a backhoe. The employee did not know what he had struck, and there was no contemporaneous report of the incident by Kellogg, Brown & Root, Inc. Eby, or anyone else. Pet. App. 2a, 14a. Further, neither Eby, its employees, nor Kellogg, Brown & Root, Inc. knew that the work on the CWA pipeline had damaged the petitioner's pipeline. Pet. App. 2a, 15a.

c. Petitioner learned that methanol was leaking from its pipeline in fall 2002, after a patch of dead grass was discovered on its property. After finding the leak, petitioner fixed the pipeline and cleaned up the site. Eventually, petitioner removed and disposed over 230,000 gallons of methanol from the subsurface of its property. Pet. App. 3a.

3. a. Petitioner filed suit in federal district court against CWA and Kellogg, Brown & Root, Inc. asserting claims under both CERCLA and the Texas Solid Waste Disposal Act, TEX. HEALTH & SAFETY CODE § 361.344. Pet. App. 3a, 10a. The parties agreed to try the case to the magistrate judge. Eby was later joined as a defendant, and the case proceed to trial against KBR and Eby only, CWA having been dismissed on summary judgment. Pet. App. 10a n. 1.

A jury was empanelled for the Texas state law claims; the magistrate judge treated the jury as advisory with respect to the CERCLA claims. Pet. App. 11a. The jury found that neither Eby nor Kellogg, Brown & Root, Inc. knew the petitioner's

pipeline had been damaged, and the magistrate judge adopted those findings. Pet. App. 15a. The magistrate judge thereafter entered findings of fact and conclusions of law (Pet. App. 10a-21a), recommending entry of judgment that petitioner take nothing. Judgment was then entered in Eby's favor. Pet. App. 22a.

b. Petitioner thereafter filed a Rule 59(e) motion and argued for the first time Eby was liable whether or not Eby knew it had hit the methanol pipeline. The magistrate judge determined there was no factual basis to infer any intent to dispose on the part of Eby, in light of the jury's findings. Pet. App. 24a. Moreover, the new claim that Eby should have investigated while digging was at most a negligence claim, which the magistrate judge held insufficient to trigger arranger liability under *Burlington Northern*. Pet. App. 24a. A take-nothing final judgment (Pet. App. 22a) was entered against petitioner.

4. a. Petitioner did not appeal the judgment in favor of Kellogg, Brown & Root, Inc.. Further, on appeal to the Fifth Circuit, petitioner did not challenge the evidence or the findings of the magistrate judge and jury. Thus, it was undisputed that Eby's back-hoe operator was unaware that the petitioner's pipeline had been struck or that any damage had occurred. Petitioner argued Eby was still liable as an arranger, now claiming that Eby's employee's failure to investigate was a conscious disregard of Eby's contract duties to CWA and of common industry practices. Petitioner argued this conscious disregard

was equivalent to intent. Eby complained the argument was not preserved.

b. The court of appeals affirmed the judgment in favor of Eby. The court first concluded that petitioner had waived its conscious-disregard argument because the case had not been tried on that theory. Pet. App. 4a. The court noted that petitioner did not seek a finding on conscious disregard, but instead "tried this case on an entirely different theory – that Eby had actually known that it had struck and damaged the [petitioner's] pipeline and then attempted to cover it up." Pet. App. 4a-5a.

c. Second, the court of appeals – relying on this Court's decision in *Burlington Northern* – agreed with the magistrate judge that Eby was not liable as an arranger under CERCLA because it did not plan or take any intentional steps to release methanol from petitioner's pipeline. Pet. App. 8a. The court rejected petitioner's claim that conscious disregard of a duty to investigate would be tantamount to intentionally taking steps to dispose of a hazardous substance. Pet. App. 8a.

5. Petitioner's request for rehearing and rehearing en banc were denied (Pet. App. 26a), with no member of the court of appeals requesting a vote.

ARGUMENT

The court of appeals correctly concluded that petitioner had waived its conscious-disregard argument since it tried its CERCLA case on the theory that Eby knew and covered up the disposal of a hazardous substance. The decision below, holding that Rule 59(e) cannot be used to argue new legal theories, does not conflict with the holding of any court of appeals. The Fifth Circuit's alternative holding – that conscious-disregard allegations do not establish arranger liability – is that court's first application of *Burlington Northern*. Other appellate courts, however, have not yet examined *Burlington Northern* and, thus, there is no existing circuit split.[1] Under those circumstances, further review is not warranted.

1. a. This case does not present a suitable vehicle to take up the question of whether conscious disregard establishes intent in arranger cases because the issue was waived at trial. The blind-eye, deliberate-indifference, willful-ignorance, or conscious-disregard arguments were not raised by petitioner until after trial, in its Rule 59 motion or on appeal. Petitioner conceded this fact to the court of appeals during oral argument.

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[1] The only post-*Burlington Northern* case petitioner has cited (Pet 10) is a district court opinion denying a Rule 12(b)(6) motion and allowing discovery in aid of arranger liability's "fact-intensive inquiry." *United States v. Washington State Dept of Transp.*, 665 F. Supp. 2d 1233, 1242 (W.D. Wash 2009)

The court of appeals' conclusion (Pet. App. 4a) that petitioner waived its argument is fully consistent with Rule 59(e) and the holding of other courts of appeals: "Rule 59(e) does not give a party the opportunity to undo its own procedural failures or present new evidence or arguments that could and should have been presented to the district court prior to the judgment." *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996); *see also United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006) (holding Rule 59(e) cannot be used to tender new legal theories or raise arguments which could have been made prior to entry of judgment); *Pac. Ins. Co. v. Am. Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (Rule 59(e) motion not available "to enable a party to complete presenting his case after the court has ruled against him" (quoting *Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995)).

Moreover, the magistrate judge concluded petitioner's theory was a claim of negligence, insufficient to trigger arranger liability after *Burlington Northern*. Pet. App. 42a. Reframing that argument on appeal as a strategy-of-willful-ignorance claim (Pet. 15), petitioner sidesteps both the way the case was tried and the nature of its post-judgment claims in the district court, moving from negligence concepts to intentional conduct. The court of appeals, however, correctly held petitioner had waived its newly-minted argument under either pre-existing Fifth Circuit precedent, or *Burlington Northern*. Pet. App. 5a & n. 1.

Because petitioner did not preserve its conscious-disregard argument prior to judgment, this alone is reason to deny further review.

b. With respect to the court of appeals' waiver holding, petitioner argues (Pet. 15-17) that the decision below is in conflict with a decision of the Fourth Circuit, but there is no merit to the suggestion. The limits of Rule 59(e) were not even at issue in *Crofton Ventures L.P. v. G & H Partnership*, 258 F.3d 292 (4th Cir. 2001). The plaintiff Crofton argued at trial, in final argument, that the defendant actively dumped waste, or that wastes had passively leaked onto the defendant's land. The district court "misconstrued the requirements for establishing liability under CERCLA" by requiring the plaintiff to prove the defendant actually dumped waste or was involved in the dumping. *Id.* at 298. The majority panel held that disposal of waste includes both active dumping and passive leaking of hazardous waste, and the distinction had been properly raised in closing argument. The dissent disagreed, finding a delay in arguing the passive theory in final summation. *Compare id.* at 298 n. 3 with 301 & n. 1. Still, that divided holding does not conflict with the Fifth Circuit's decision here, where petitioner waited until after entry of judgment to argue a new legal theory of liability.

As the court of appeals below correctly observed, petitioner never raised the issue pretrial or obtained findings from the court or jury that Eby consciously disregarded any duty because it tried the case "on an entirely different theory." Pet. App. 5a. The factual

differences between this case and *Crofton Ventures L.P. v. G & H Partnership* raise no important legal issue and present no conflict.

2. a. Further, this Court does not need to take up the question of whether conscious disregard establishes intent in arranger cases because lower courts will revisit the issue in light of *Burlington Northern*, but on better developed records. Petitioner claims (Pet. 8-9) that the Third, Eighth and Eleventh Circuits – in *Morton Int'l Inv. v. A.E. Staley Mfg. Co.*, 343 F.3d 669 (3rd Cir. 2003); *United States v. TIC Investment Corp.*, 68 F.3d 1082 (8th Cir. 1995), *cert. denied*, 519 U.S. 808 (1996); and *South Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402 (11th Cir. 1996) respectively – held that specific intent is not required or determinative for arranger liability. Every appellate decision cited by petitioner was decided well before *Burlington Northern* and all were discussed in the *Burlington Northern* briefing before this Court.[2] There is a substantial likelihood that these courts of appeals will reconsider their decisions in light of the Court's intervening decision, and some of these holdings may be discredited after application of *Burlington Northern*'s statutory analysis. The Court should therefore decline to examine the conscious-disregard question now, especially on what the court

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[2] *See* Brief of the United States in Opposition at pp. 14-15, *Burlington N. & Santa Fe Ry Co v. United States*, 129 S Ct. 1870 (2009) (07-1601 and 07-1607), 2008 WL 5266416

of appeals correctly determined is an undeveloped record. Pet. App. 5a & n. 1.

b. Although petitioner also claims the Second Circuit's approach (testing an obligation to control disposal) differs from the Ninth Circuit's approach in *Cadillac Fairview/Cal., Inc. v. United States*, 41 F.3d 562, 566 (9th Cir. 1994) (imposing liability without control in light of all the circumstances) (Pet. 8), this does not establish a circuit split on the same matter. Because "Congress has created multiple and co-equal intermediate federal appellate courts, each with an equal power and duty to decide the cases properly brought before it," its design necessarily contemplates "the possibility of a considered difference in views among the circuit courts on a given question." *Washington Energy Co. v. United States*, 94 F.3d 1557, 1561 (Fed. Cir. 1996). Arranger liability has always been fact-bound, as the courts must look past "the parties' characterization of the transaction as a 'disposal' or a 'sale' and seek[ ] to discern whether the arrangement was one Congress intended to fall within the scope of CERCLA's strict-liability provisions." *Burlington Northern* at 1879. These allegedly conflicting approaches merely acknowledge the case-by-case factual analysis involved in arranger liability; but again, their analyses will be further refined as they apply *Burlington Northern*'s reasoning.[3]

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[3] *Burlington Northern* reversed the Ninth Circuit's holding that the defendant in that case had "sufficient control over, and

(Continued on following page)

3. a. The decision of the court of appeals was correct. Petitioner is mistaken in its suggestion that *Burlington Northern* should be limited to the useful product doctrine because only there is the intention of a seller important. Pet. 9. That argument disregards the statutory text. In *Burlington Northern*, this Court looked to the ordinary meaning and dictionary definition of the term "arrange for" and found that "under the plain language of the statute, an entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance." *Id.* at 1879. The same statutory language applies to the alleged arranger liability in this case; petitioner offers no principled reason to use a different meaning of "arrange for" in this case, except its circular argument (Pet. 9) that conscious disregard should suffice.

Eby did not know or desire that a disposal of a hazardous waste would result from its construction activities in 1979. And such knowledge alone, if it had existed, would still not prove that Eby planned to dispose of a hazardous substance. This Court in *Burlington Northern* concluded that "knowledge alone is insufficient to prove that an entity 'planned for' the

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knowledge of, the transfer process to be considered an 'arranger,' within the meaning of CERCLA" and "an entity can be an arranger even if it did not intend to dispose of the product." *United States v Burlington N & Santa Fe Ry. Co*, 520 F.3d 918, 949 (9th Cir. 2008). The holding in the Ninth Circuit's earlier precedent *Cadillac Fairview/Cal., Inc v United States*, 41 F.3d 562, 566 (9th Cir. 1994) is also of questionable vitality

disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product." *Id.* at 1880. Although petitioner emphasizes the Court's mention of sale of a useful product, the Court's holding is just as supportive in a case like this. Whether waste or a useful product is at issue, evidence of intentional steps to dispose of the substance is necessary. A case involving disposal of waste may be easier for a plaintiff to prove a plan to dispose; a case involving the sale of a useful product may be much harder; and the balance of cases in the middle will present their own particular issues. But each will, pursuant to the language of the controlling statute, require evidence that the potentially responsible party took intentional steps and planned for the disposal of a hazardous substance.

b. Petitioner is wrong when arguing that a variety of parties will "avoid" CERCLA liability based on the court of appeals' rationale. Pet. 14. As the Court explained, arranger liability is fact-intensive and case specific. In this case, disposal of a hazardous substance was not an inherent or inevitable part of Eby's installation of a water pipeline. Eby did not know that petitioner's methanol pipeline had been damaged in its construction activities or that a leak would result over 20 years later. Pet. App. 15a. Petitioner's claim that Eby "deliberately turned a blind eye to the damage it did" (Pet. 15) is mere speculation, untested before a finder of fact. In contrast, petitioner's hypothetical cases involving accumulation of drums leaking hazardous substances; a truck

driver in a drum staging area; and a driver knowingly hauling hazardous waste, would present application of arranger law in a different context. Nevertheless, all of these fact scenarios sit comfortably within the *Burlington Northern* holding that arranger liability may not extend beyond the limits of the CERCLA statutory language.

To be sure, a party who is merely negligent will not have undertaken intentional steps to dispose and thus will not have arranged for disposal after *Burlington Northern*. CERCLA liability is properly precluded under those circumstances, and both lower courts here were correct in reaching that conclusion.[4] Pet. App. 8a, 24a.

c. Petitioner complains that if Eby is not liable, then no one is. The magistrate judge rejected the introduction of this argument post-judgment (Pet. App. 24a-25a) and noted petitioner had waived any claim that it was entitled to a third-party defense under the CERCLA statute. Petitioner decided to claim Eby was an arranger because it allegedly conspired with CWA and Kellogg, Brown & Root, Inc. to cover up a known disposal of waste. It failed to

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[4] Petitioner elected not to pursue a state common law negligence theory against Eby. On appeal, petitioner nevertheless argued that the common law of negligence imposed a duty on Eby to investigate what it hit while engaging in construction activities (Pet App 3a), and that its conscious disregard of the negligence duty established arranger liability

prove those allegations, and that is why Eby was not liable.

There is likewise no sound basis for the speculation of petitioner (Pet. 15) that owners will avoid cleanup operations over concern about costs, or that the government or taxpayers will carry the burden. Owners and operators are already potentially responsible parties under Section 107(a)(1), 42 U.S.C. § 9607(a)(3). Moreover, the questions involved in determining arranger liability under CERCLA are distinct from those involved in determining owner or operator liability. Proper construction of the legal standard for CERCLA arranger liability is neither reward nor punishment for conduct (Pet. 15); rather it enforces plain language and ordinary meaning, and therefore promotes the ultimate legislative purpose for enacting CERCLA. *See Gross v. FBL Fin. Services, Inc.*, 129 S. Ct. 2343, 2350, 174 L. Ed. 2d 119 (2009).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE W. VIE III
Counsel of Record

FEBRUARY 2011

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(3)

No. 10-958

Supreme Court, U.S
FILED
MAR 8 - 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CELANESE CORPORATION,
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v.

MARTIN K. EBY CONSTR. CO., INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

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CELANESE CORPORATION,
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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

The last question put to Eby by the court of appeals at oral argument was whether Eby would have been liable as an arranger if it had known that its backhoe hit the Celanese pipeline. The answer was no. Its response to the petition clearly suggests that it agrees with the Fifth Circuit that a party must "desire" to cause environmental contamination in order to be an arranger. Br. at 11.

This specific intent requirement effectively guts arranger liability. Under it, Eby could have known that its backhoe hit the pipeline; known that the damage would inevitably cause a leak; deliberately

decided not to report the damage; and yet still escape arranger liability. Congress intended CERCLA to impose liability on those who cause pollution. It could not have intended to impose liability only on those who specifically intend to pollute.

I. THERE IS A SUBSTANTIAL AND LONG-LASTING CIRCUIT SPLIT ON THE INTENT REQUIRED FOR CERCLA ARRANGER LIABILITY.

Celanese's petition established that there is a deep and abiding circuit split on whether arranger liability includes a specific intent requirement. Eby quibbles a bit on the margins, Br. at 9-10, but does not seriously dispute the existence of the split.

Instead, Eby speculates that those courts disavowing a specific intent requirement might revisit the issue in light of *Burlington Northern*. Br. at 9. There is no reason to expect this speculation will come to fruition. None of the cases rejecting specific intent involved the useful product issue. *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 679 n.6 (3rd Cir. 2003) (manufacturing process); *United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1089 (8th Cir. 1995), *cert. denied*, 519 U.S. 808 (1996) (dump); *South Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402, 407 (11th Cir. 1996) (aerial spraying). Specific intent may be relevant to the distinction between a useful product and the disposal of hazardous waste. If arranger liability is to have any meaning, specific intent cannot be necessary in other contexts.

Eby's response to that distinction distorts Celanese's position. Celanese has not argued the "intention of a seller" matters only in useful product cases. Br. at 11. Celanese has argued that the **specific**

intent of the arranger is only relevant in that context. Specific intent is only one form of intent. Conscious disregard is another well-recognized form of intent. This Court has so held in other contexts; the lower federal courts have so held in the specific context of arranger liability. Eby has nothing to say about this argument other than a naked and unexplained assertion that it is a circular argument. Br. at 11.

Eby claims that the Court should await a "better developed record." Br. at 9. The instant record is as well developed as any future case could be. We know, because the District Court so found, that Eby's backhoe hit the Celanese pipeline; that the hit caused the spill; and that Celanese bore no responsibility whatever for the spill. We know, because the District Court so found, that Eby knew it had hit something, although it did not know what. We also know, because Eby's own employees so testified, that the industry custom is to investigate immediately when a backhoe strikes something while digging in a pipeline corridor. We know, because Eby did not know what it hit, that Eby cannot have conducted such an investigation.

Thus, the record directly refutes Eby's argument that the conscious disregard theory is "mere speculation." Br. at 12. How could Eby not have known what it hit unless it turned a blind eye? Eby never even tries to suggest an answer.

The record clearly establishes that Eby consciously disregarded the possibility that it had hit the Celanese pipeline and that Eby's conduct was the sole cause of the spill. If the Court agrees with Celanese that conscious disregard satisfies the intent element of arranger liability, at least outside the useful

product context, Celanese is entitled to judgment. The record in this case presents that question with crystal clarity.

II. THE SPECIFIC INTENT REQUIREMENT IS DIRECTLY CONTRARY TO THE PURPOSES OF ARRANGER LIABILITY.

Celanese's petition established the disastrous policy consequences of the Fifth Circuit's opinion. Requiring specific intent for arranger liability in all cases creates an enormous incentive for polluters to turn a blind eye to the environmental consequences of their conduct. It punishes responsible companies like Celanese and imposes unnecessary costs on taxpayers. The whole point of arranger liability is to prevent polluters from consciously disregarding the effects of what they have done.

Eby does not dispute that Congress intended arranger liability to prevent polluters from turning a blind eye. It does not dispute that the specific intent requirement would relieve polluters of arranger liability in a host of instances that Congress could not have intended.

Eby does argue that arranger liability is "fact intensive" and "case specific." Br. at 12. It claims that Celanese's hypotheticals arise "in a different context" but "sit comfortably within the *Burlington Northern* holding that arranger liability may not extend beyond" the statutory language. Br. at 13.

These arguments beg the question. Celanese has never suggested that arranger liability extends beyond the words of the statute, just that the statute does not require specific intent to pollute, at least outside the useful product context. One of the reasons that conscious disregard must be sufficient to

establish arranger liability outside the useful product context is that a contrary rule would immunize large numbers of polluters from liability, even though their conduct was the sole cause of the contamination.

"Examination of purpose is a staple of statutory interpretation." *McCreary County v. ACLU*, 545 U.S. 844, 861 (2005). Eby does not dispute that the purpose of CERCLA generally is to impose liability on those who contaminate the environment and that the purpose of arranger liability specifically is to prevent polluters from consciously disregarding the consequences of their actions. The Fifth Circuit's specific intent requirement is directly contrary to those purposes.

Eby does not dispute that, if it is not liable for the cleanup, no one is, leaving the taxpayers to pick up the tab. Eby claims that the District Court found that Celanese had waived any claim it was entitled to a third party defense. Br. at 13. What the District Court actually held was that it was "unmoved" by this argument because "[n]obody sued Celanese." App. 24a-25a.

Once again, this holding is directly contrary to the statutory purpose. CERCLA "encourages voluntary private action to remedy environmental hazards," thus furthering the goal of "responding to hazardous situations." *In re Dant & Russell, Inc.*, 951 F.2d 246, 248 (9th Cir. 1991). *Accord*, *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 n.13 (1994) ("CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup"). The Fifth Circuit's holding creates a strong incentive to act in precisely the opposite fashion: delay and stonewall when there is a reasonable likelihood that someone else caused the environmental damage.

Eby's argument that the owner/operator liability provisions in CERCLA are adequate to ensure voluntary cleanups, Br. at 14, thus misses the mark. Neither the owner nor the operator is liable when the cause of the spill is the actions of a third party. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3). In cases like this, when there is a reasonable likelihood that some third party caused the spill, the Fifth Circuit's opinion necessarily discourages a quick, voluntary cleanup.

The sole cause of this spill was the damage that Eby's backhoe did to the pipeline, combined with Eby's intentional failure to investigate what it knew it had hit. In every other context, conscious disregard of the consequences of one's action satisfies any general intent requirement that a statute may impose. There is no reason to adopt a different rule for arranger liability under CERCLA.

III. EBY'S WAIVER ARGUMENT DOES NOT PREVENT REVIEW OF THE PURELY LEGAL ISSUES PRESENTED BY THIS PETITION.

Celanese's position on the waiver issue is simple: if the Court agrees with Celanese on the meaning of "arrange" in CERCLA § 107(a), then the facts found by the District Court require the legal conclusion that Eby is an arranger. That Celanese attempted to prove more facts at trial, and failed, does not matter. Eby does not dispute that *Crofton Ventures L.P. v. G&H Partnership*, 258 F.3d 292 (4th Cir. 2001), squarely supports the latter proposition.

Instead, Eby argues that Celanese waived this purely legal issue of what conduct establishes arranger liability by not raising it until the Rule 59(e)

motion. Br. at 7. All of the cases that Eby cites, however, involve the submission of additional evidence after the court had ruled against the movant. Obviously, the efficient administration of justice requires parties to produce all of their evidence on summary judgment or trial.

The instant case does not involve new evidence. It involved a bench trial with each side free to offer all relevant evidence. The District Court entered complete findings of fact based on that record. Celanese's argument is that the facts found by the District Court require a judgment for Celanese, and that the District Court's contrary conclusion misunderstands the nature of arranger liability under CERCLA. A Rule 59(e) motion will lie when "the earlier ruling was premised upon a misunderstanding of a relevant regulatory scheme." *Atlantic States Legal Foundation v. Karg Bros.*, 841 F. Supp. 51, 55 (N.D.N.Y. 1993).

Because the issue is purely one of law, Celanese would not even have been required to present it to the District Court. *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994), is directly in point. At trial, Detrex conceded that it was an "owner" for purposes of CERCLA liability. On appeal, it argued that, as a matter of law, it was not a CERCLA owner. The Seventh Circuit reached the merits:

> The new ground is fully argued in the brief of the appellant, so that Elkhart had – and it took – a full opportunity to respond. The ground rests entirely on a pure issue of statutory interpretation . . . . The issue having been fully briefed and argued, there is no reason to defer its resolution

> to another case. There will be no better time to resolve the issue than now.

2 F.3d at 749-50. That is the instant case.

The Fifth Circuit's opinion works a complete injustice between the parties. The innocent pipeline owner and the taxpayers are stuck with the cost of cleaning up the mess that Eby made, and Eby is relieved of all liability. Had Eby acted responsibly, there would never have been a methanol spill and the cost of immediate repairs to the pipeline would have been a tiny fraction of the cost of remediation.

Still worse is the message that the Fifth Circuit has sent to other would-be polluters: close your eyes, ignore the facts, and you too will be able to avoid arranger liability. That message is utterly at odds with the purpose behind CERCLA. The fully developed factual record permits this Court to reverse that message and establish once and for all that specific intent has no place in arranger liability outside of the useful product context.

CONCLUSION

For these reasons, Celanese respectfully prays that the Court grant its petition for writ of certiorari to the Fifth Circuit.

Respectfully submitted,

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